

No. 134

Office - Supreme Court, U. S.

JUN 18 1945

CHARLES ELMORE DROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1944

ROY K. O'KELLEY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

AND

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

HENRY LINCOLN JOHNSON, JR.,
Attorney for Petitioner.



INDEX

| | Page |
|--|------|
| Petition for Writ of Certiorari..... | 1 |
| Pertinent Facts | 2 |
| Questions Presented | 3 |
| Reasons for Granting Writ..... | 5 |
| Brief in Support of Petition for Certiorari..... | 7 |
| Jurisdiction | 7 |
| Argument | 8 |

TABLE OF CASES CITED

| | |
|--|----|
| Bailey v. Alabama, 219 U. S. 219, 55 L. Ed. 191..... | 12 |
| Blockburger v. U. S., 120 U. S. 299, 76 L. Ed. 306..... | 11 |
| Byars v. U. S., 273 U. S. 28, 71 L. Ed. 520..... | 9 |
| Casey v. U. S., 276 U. S. 413, 72 L. Ed. 632..... | 13 |
| Fraternal Order of Eagles v. U. S., 57 Fed. (2d) 93, 94.... | 9 |
| Heiner v. Donnan, 285 U. S. 312, 76 L. Ed. 772..... | 13 |
| Henderson v. U. S., 12 Fed. (2d) 528..... | 9 |
| Malinski v. People of the State of New York, — U. S. — (Decided March 26, 1945, No. 367)..... | 9 |
| Nusslein v. Dist. of Col., 115 Fed. (2d) 690..... | 9 |
| United States v. Baldocci, 42 Fed. (2d) 567..... | 9 |
| U. S. v. Setaro, 33 Fed. (2d) 134..... | 9 |
| Weeks v. U. S., 232 U. S. 383, 58 L. Ed. 652..... | 9 |
| Western A. R. Co. v. Henderson, 279 U. S. 639, 73 L. Ed. 884 | 12 |

STATUTE INVOLVED

The Marihuana Tax Act of 1937, as amended (26 U. S. C. 2590 through 2593).



IN THE
Supreme Court of the United States

October Term, 1944

ROY K. O'KELLEY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA**

To the Honorable the Chief Justice of the United States
and the Associate Justices of the Supreme Court of the
United States:

Your petitioner respectfully represents:

(1)

That on April 16, 1945 the United States Court of Appeals for the District of Columbia, affirmed a judgment of conviction in a criminal case against petitioner which had been entered in the District Court of the United States for the District of Columbia. The Court in its opinion, while reversing an order the first count of the indictment, affirmed the conviction on the second count. Petition for a rehearing was denied April 12, 1945.

(2)

The two counts of the indictment were for the illegal possession of marihuana, as defined by the Marihuana Tax Act of 1937, as amended.

- (a) Count 1 charges possession of certain marihuana found in petitioner's apartment at 1701 New Jersey Avenue N.W. in the District of Columbia, on March 26, 1944.
- (b) Count 2 charges possession of marihuana at an apartment of petitioner on Providence Street N.E. in the District of Columbia, on March 26, 1944 "*But at a time other than that referred to in the first count.*"

Judgment of conviction was entered against petitioner on August 2, 1944 and he was sentenced to imprisonment for a period of sixteen (16) months to four (4) years and pay a fine of Five Hundred (\$500.00) Dollars on the first count; and sixteen (16) months to four (4) years on the second count of the indictment, said sentence to run concurrently with sentence imposed in the first count.

PERTINENT FACTS

Narcotic agents, without a search warrant for premises, or arrest warrant for petitioner, illegally and wrongfully entered his apartment on New Jersey Avenue, at 2:30 a. m. and searched this premises while he was in bed. (See opinion below, R. pgs. 30, 31, holding New Jersey Avenue entry, search, seizure and arrest illegal.) Petitioner alleged, on his motion to suppress (R. pgs. 7, 8) by affidavit and by testimony, that the officers proceeded to wreck the New Jersey Avenue furnishings; this was not denied by answer or testimony, except that one agent when asked whether the picture of the premises exhibited to him by counsel reflected the result of his search replied, "he didn't remember". (R. pg. 15.) That petitioner was removed to police headquarters

where O'Kelley was informed that they knew of his apartment on Providence Street, and they would do what they did on New Jersey Avenue, unless he should get "the rest of his supply" for them. Petitioner testified they informed him they were going there anyway, whereupon he acquiesced (R. pg. 17) and the marihuana upon which the second count was held was obtained (none of this was denied by government witness).

The Appellate Court erred when, despite its finding that the entry, search and seizure on New Jersey Avenue, illegal, and petitioner's "claimed consent," if any, was under "compulsion," it rules the production of other information and property, the same morning and in the same transaction, while still illegal in custody, compulsion free.

QUESTIONS PRESENTED

1

Are any of the fruits of an illegal entry upon and search of petitioner's premises, or any information or contraband secured by exacting admissions from accused, while admittedly under the coercive atmosphere of an illegal arrest, admissible in evidence over his timely objection?

O'Kelley, the Court below admitted, (R. pg. 31), gave consent "under compulsion" to the search at New Jersey Avenue, and it condemned the use of that evidence in the first count of his indictment. How, within the hour, when removed to the Narcotic Squad Room at Police Headquarters, still in illegal custody, the pattern of fear and the pain of his unlawful detention became dissipated so that his subsequent admissions and the production of the marihuana on Providence Street came as a result of his free will, is unexplained in the evidence. No interval occurred between first production of marihuana and the second except a trip to the Police Headquarters and further conversations with the petitioner.

Does the mere possession of marihuana in two dwellings by the accused give rise to two distinct violations of Section 2593 of the Marihuana Tax Act of 1937, as amended?

No testimony was produced as to where or from whom petitioner got the marihuana except that petitioner said he got it "from a source out West" (R. pg. 20); during no part of the entire proceeding was there any intimation that he had on two separate occasions obtained the marihuana. For all that the evidence shows he may have obtained it all at the same time. The only fact shown, except such as will arise by presumption in the statute, was the fact that on March 26, 1944, petitioner had some marihuana on New Jersey Avenue and that he had some on Providence Street. Where, as here, the gravamen of the tax suit is that he failed to pay a tax on the marihuana as a transferee, it would seem that if he bought it all at once he failed to pay the tax at that time, logic would seem to interdict a conclusion that he necessarily bought it in two lots where there is no evidence adduced in support of such a fact.

The presumption in Section 2593 of the Marihuana Act of 1937, as amended, violates the Fifth Amendment, in that it is arbitrary and unreasonable as applied in the case at bar.

No proof that a crime was committed except that furnished by the bare minimum of evidence declared by, the act to be "presumptive evidence of guilt." Your petitioner claims that where, as here, the only evidence produced is that of admissions of the accused, independent proof is necessary to prove corpus delicti. Due process requires that proof be presented, first, that a crime was committed, second, evidence fastening the crime upon the accused as the guilty person.

REASONS FOR GRANTING WRIT

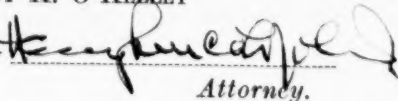
Your petitioner respectfully urges that as shown above and as will be further urged in the brief accompanying this petition, the United States Court of Appeals for the District of Columbia has rendered a decision in conflict with applicable decisions of this Court, has decided important questions of Federal Law in a manner which leaves such questions and the state of the law in grave doubt, and that the questions presented are of wide interest and application.

WHEREFORE, your petitioner prays that a writ of certiorari issue out of and under the seal of this Court to the United States Court of Appeals for the District of Columbia, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of record and all proceedings had herein and that the order of said United States Court of Appeals for the District of Columbia affirming the judgment of conviction in this cause be reversed and that petitioner may have such other relief as this Court may deem appropriate.

Dated June 18th, 1945.

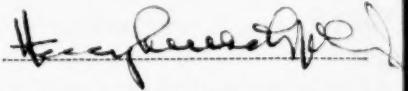
ROY K. O'KELLEY

By



Attorney.

DISTRICT OF COLUMBIA, ss:

Henry Lincoln Johnson, Jr., being first duly sworn according to law deposes and says: I am attorney for the petitioner herein; said petitioner is incarcerated; I have read the foregoing petition and know the contents thereof. The facts therein stated are true to my best information and belief.



Subscribed and sworn to before me this 18th day of June, 1945.



Notary Public, D. C.

